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[March,

The second point was principally relied on by the defendants, and may be embodied as follows: Can a married woman be sued *at law* on a contract made since the adoption of the Code of 1887, being, at the time of making said contract, possessed only of equitable separate estate?

Counsel for defendants relied at great length upon those views held by many members of the bar, and espoused so earnestly in several articles in the REGISTER by that able lawyer, Mr. Martin P. Burks. Counsel for plaintiff, on the other hand, conformed his argument to the lines of reasoning repeatedly set out by the editor of the REGISTER, and particularly to the learned article which appeared in the November number for 1898.

The following principal points were thus brought under the consideration of the court, and were passed upon as follows:

(1) Ownership of statutory separate estate is not an essential pre-requisite to enable a married woman to make contracts binding upon her personally. She has, in addition to her separate estate, the other sources of credit as set forth in section 2288, Code 1887.

(2) Code, section 2294, provides that equitable separate estates "shall not be deemed to be within the operation of the said sections" (the sections preceding section 2294 in this chapter). This provision can only mean that those rules of equity governing equitable separate estates still exist, except so far as altered by the preceding sections. And further, section 2294 provides that equitable separate estates "shall be subject to and governed by the rules and principles of equity applicable to such estates." This, too, can only mean that those rules of equity still exist which are not altered by statute.

The court held the case to be within the jurisdiction of a court of law, and entered a *personal judgment* against the wife.

It may also be of interest to the REGISTER to know that the court stated in terms its approval and adoption of the views taken by the editor in the November number for 1898.

Richmond, Va.

HUNSDON CARY.

JUDGMENT AS A LIEN ON A LAPSED DEVISE.

Editor Virginia Law Register:

Quite an interesting question recently came to the attention of the Circuit Court of Augusta county, in the case of *H. C. Palmer's Trustee v. George Stuart's Infants*. The question seems never to have been passed upon by our Court of Appeals, or, in fact, by any court of last resort, so far as counsel in that case have been able to find.

The facts in the case, as they developed during the progress of the case, are as follows:

On August 15, 1887, one Mrs. C. A. Johnson, a resident of Augusta county, departed this life, having first made and published her last will and testament, under one clause of which the testatrix devises a tract of land to one George Stuart, an ex-slave of hers. In the year 1884, H. C. Palmer recovered a judgment against George Stuart, which was duly docketed in the proper office. On July 27, 1887, just eighteen days before the death of the testatrix, George Stuart,

the devisee and judgment debtor, departed this life, leaving surviving him two children, who are still living.

H. C. Palmer having made an assignment, suit was brought against George Stuart's administrator and infants by H. C. Palmer's trustee, the object of which was to enforce the lien of the said judgment against the land devised to George Stuart, in the hands of his infants. This suit was resisted by the infants on the ground that they took the land under the will of the testatrix, and not as heirs at law of their father, and hence they took it free from the debts, by lien or otherwise, against their father.

Under the common law this devise would have lapsed and gone back to the estate of the testatrix. And the only way in which the plaintiff could possibly recover, if at all, was by virtue of our statute, section 2523 of the Code of 1887, which provides as follows: "If a devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will."

No "other disposition is made or required by the will," so that the case came squarely under this statute.

Plaintiff contended that, if George Stuart had survived the testatrix, he would have taken the land devised to him, subject to the payment of the plaintiff's judgment; and the statute saying that the surviving "issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator," then the issue take the land subject to the lien of the said judgment. No authorities directly in point were cited by the plaintiff's counsel to sustain this contention.

The defendants resisted the case on two grounds: First. The judgment is a lien against George Stuart, and could only attach against the property of George Stuart. The land in question was never the property of George Stuart, he having died before the testatrix, whose will could not speak until her eyes were closed in death. George Stuart never at any time became "possessed or entitled" to the real estate devised to him by the testatrix, and therefore the lien of plaintiff's judgment could not attach as against said real estate; citing section 3567 of the Code of Virginia.

Second. That section 2523, above quoted, means what it says, viz.: that "such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator." Had the devisee, George Stuart, survived the testatrix, he would have taken the land *under the will of the testatrix*, which would have given him an absolute, fee-simple, unencumbered estate in the land—the testatrix owing no debts at the time of her death. And therefore the issue of the devisee, George Stuart, take the land just as he "would have done if he had survived" the testatrix; they took an absolute, fee-simple, unencumbered estate in the land, free from any debts, by lien or otherwise, against their father. The legislature, by the language used in the statute referred to, clearly meant to eliminate all idea of heirship, by restricting or saving the devise to the *surviving issue* of the devisee or legatee.

But plaintiff's counsel contended that George Stuart would have taken the land subject to the lien of the judgment sought to be enforced in the suit; and therefore, under the statute, his surviving issue take just the same way, subject to the

lien of said judgment. Is this proposition a sound one? Defendants' counsel contended that it is not. The judgment against George Stuart could not attach to any one's land except that of the judgment debtor. He never became "possessed or entitled" to the land in question, and the judgment could not attach until he became so possessed or entitled. The vesting of title to the land in the judgment debtor must precede the attaching of the lien of the judgment, which never occurred in this case.

The court, after mature consideration of the questions involved, sustained the views of defendants, and dismissed the case, with costs to the defendants.

The decision of the court met with the general approval of the members of the bar here; and it is needless to say that the writer most heartily approved the decision, as he was counsel for defendants in the case.

F. B. KENNEDY.

Staunton, Va.